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**MILITARY DISCIPLINE AND ACCOUNTABILITY:  
TRADITIONAL APPROACHES OR NEW STANDARDS FOR A NEW MILLENNIUM?**

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## **Military Discipline and Accountability: Traditional Approaches or New Standards for a New Millenium?**

### **Introduction**

1997 was a banner year for military scandals Kelly Flinn, Sergeant Major of the Army Gene McKinney, the Aberdeen sexual harassment fiasco, General Joseph Ralston, and General Terryl Schwalier were just a few of the issues and people in the national spotlight causing Americans to wonder what kind of military their tax dollars are supporting Add to this the interminable sex scandal involving the President of the United States and one naturally wonders whether the government deserves the public's confidence From the Commander-in-Chief down, these well-publicized spots of decay in the military—an institution consistently among the most respected in this nation—have given it an undeserved black eye <sup>1</sup>

In the past, the military has usually been able to pick itself up and dust itself off after taking such punches Learning from these experiences has often made it stronger and better able to avoid them in the future <sup>2</sup> One of the best contemporary examples of this desire to emerge stronger after humiliation and embarrassment was the healing process the Navy is still going through following its Tailhook scandal Though painful, by holding many of the principal actors accountable for their criminal offenses and leadership failures, the Navy's catharsis has made its standards and expectations clearer than they have been in a long time <sup>3</sup> Fortunately, at that time, many agreed that holding Tailhook's major culprits accountable was an integral part of the healing process Even Congress got into the act when it denied promotion to several officers whom it considered unfit because of their involvement <sup>4</sup>

What made 1997's scandals notably different, and potentially more destructive, than those of years past was the lack of consensus on whether and how their central figures should be

dealt with. The two most divisive cases occupied opposing ends of the year's scandal spectrum. At one end, the Lieutenant Kelly Flinn case was perhaps not only the year's most notorious, it was also the most misunderstood. Her media campaign, designed to turn the tables on the Air Force when it charged her with a number of serious offenses and some minor ones, including adultery, masterfully confused not only the issues, but also the American people. Before the smoke cleared, the Secretary of the Air Force succumbed to intense public and congressional pressure and simply discharged her administratively instead of court-martialing her as her commanders recommended. At the other end, Brigadier General Terryl Schwalier, the Air Force commander whose unit was decimated in the 1996 Dhahran "Khobar Towers" bombing, retired after the Secretary of Defense denied his promotion to major general. In this case, as in Lt Flinn's, the military's civilian leadership overruled the carefully considered judgment of its senior uniformed officers.<sup>5</sup> Despite the adverse findings by a Department of Defense commission led by retired army General Wayne Downing, the Air Force's investigations concluded that General Schwalier bore no responsibility for the bombing or its casualties.

Some observers of the military consider these and other, similar cases evidence of a "cultural rift between American society and its professional military."<sup>6</sup> Perhaps they are. They certainly do suggest that many outside the military either disagree with or don't understand the standards to which we currently hold our members. Comments like those from Senator Trent Lott admonishing the Air Force to "get real" rather than prosecute Kelly Flinn<sup>7</sup> and by former Assistant Secretary of the Army Sara Lister describing Marines as "extremists"<sup>8</sup> have prompted considerable discussion about whether this possible cultural rift should be remedied by making military standards, values, and laws more reflective of society's. While this debate may help both sides better understand the other's position and, thereby, ultimately narrow whatever rift

might exist, most of it misses a very important point—a point that lies at the heart of why military standards are what they are. Standards, values, and laws exist because they have proved to be the glue that holds the military together and makes it an effective and efficient force. They are unimportant and therefore unintelligible to anyone in or out of uniform unless they are considered in the context of why the military exists—to fight wars.

This essay proposes that when we discuss changing military standards, values, laws, and the processes designed to hold our personnel accountable, civil-military relations must be a secondary consideration. Our primary focus must be on the impact of those changes on the military's ability to do its job. I do not intend to argue that the proponents of change are entirely wrong. In fact, I believe they are partly right—we *do* need to update our approach to standards and discipline. However, I disagree with their underlying rationale and the direction they want us to go. Rather than liberalizing military law—doing away with the adultery offense, for example—I will argue that we must simply shift our primary focus away from it. The changing ways of war demand we temper our preoccupation with law and replace it with a renewed emphasis on the law's underlying purposes and the values it seeks to promote.

To achieve these objectives, I will examine how standards and discipline have evolved through recent history. Hopefully, this will help demonstrate that the rough patch we've hit in the last few years is more a result of the mismatch between the public's perception of our approach to accountability and the demands of new ways of war than a reflection of how we have lost touch with reality. Projecting this history into the future, I will then suggest that 21<sup>st</sup> Century warfare ultimately will reveal law to be the outer boundary of acceptable military conduct—one not necessarily congruent with the limits of the military's trust and confidence in its people. The gradual substitution of individual for unit combat will require an even greater

need for personal accountability and adherence to standards That can be accomplished only by instilling in each military member the core values of our profession

### **Military Values and Discipline Yesterday and Today**

The standards of conduct and discipline that distinguish the U S military from the rest of American society have a long and proud heritage They reach at least as deep as our country's predominantly European roots It is fair to say that most people today understand intuitively that the military, upon whose shoulders rests the defense of our nation, must possess certain qualities that make it an effective fighting force

Carl von Clausewitz, the 19<sup>th</sup> Century master of military strategy, coined the term "military spirit" to describe many of these intangible attributes This spirit, he wrote, can come only from "a series of victorious wars" or from the army's "frequent exertion to the utmost limits of its strength " Such trials by fire unite armies and instill in them the pride that will continue their success Today, most nations and particularly the United States are unable or unwilling to wait for the crucible of war to temper their forces Clausewitz, too, recognized that war should not be the first test of an army Peacetime training is critical and "[d]iscipline, skill, goodwill, a certain pride, and high morale, are the attributes of an army trained in times of peace " <sup>9</sup> Finally, while discipline is important, Clausewitz cautioned that it should not be overrated "Grim severity and iron discipline may be able to preserve the military virtues of a unit, but it cannot create them " <sup>10</sup> He thus suggested that a balance of pride and discipline, each instilled in proper measure, characterizes a truly successful army

Shortly before Clausewitz penned his theories of war, the United States fought its Revolutionary War The American army and navy that grew out of that war adopted almost verbatim as their guiding principles the British Articles of War and Articles for the Government

of the Navy. Those rules and regulations included provisions for enforcing discipline<sup>11</sup> Although both sets of regulations established courts-martial as the principal processes for formally dispensing such discipline, their prevailing concern was that commanders should have considerable authority to impose punishment at the times and places of their choosing. Therefore, early courts-martial provided little more than thin procedural insulation between the commander and the accused.

Except for a few relatively minor revisions of the Articles of War imposed by Congress upon a military establishment “reactionary and monolithic in its attitudes regarding military justice,” these pre-Revolutionary War rules guided the U.S. military through World War II.<sup>12</sup> After that war, however, a number of perceived miscarriages of justice led to the study and revision of the Articles of War in an attempt to resolve the inherent tension between military notions of discipline and civilian notions of justice. The ultimate result was the Uniform Code of Military Justice (UCMJ).<sup>13</sup> In a nutshell, the UCMJ adapted to military law many procedural protections commonly found in civilian criminal trials, such as the right to a law-trained defense counsel, a military judge to preside over courts-martial, and the right to appeal convictions to a new Court of Military Appeals. Underlying these many changes and the rejection of many others remained the essential principle that the entire court-martial process should be initiated by commanders for the purpose of imposing discipline. Thus, a critical feature of this new code was its retention of such purely military offenses as desertion, AWOL, disobedience of a lawful order, and mutiny.

Today, after a few additional revisions, the UCMJ remains a commander’s disciplinary tool. In fact, rather than diminishing in importance in recent years as it sometimes diverges from society’s views of justice, its relevance remains obvious to many, including the Supreme Court.

In 1975, Justice Lewis Powell described this relationship between military law and discipline

The military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history, but they are founded on unique military exigencies as powerful now as in the past.<sup>14</sup>

The key question, of course, is whether those military exigencies will remain sufficiently powerful in the 21<sup>st</sup> Century to warrant the military's continued enforcement of laws that, as the Kelly Flinn case and others demonstrate, continue to diverge from society's notions of justice

Before considering that question, though, it is important briefly to distinguish the UCMJ's criminal standards from standards of professional military ethics commonly known today as "military values." As an Air Force officer, I am most familiar and conversant with these values as they have been described by recent Air Force Chiefs of Staff. One particular Chief of Staff, General Ron Fogleman, established as his gospel the need to return to core values. He preached that the nature of the Air Force's business—"to fight and win America's wars when called on to do so"—demands that its members' professional and personal standards be unimpeachable.

Because of what we do, our standards must be higher than those of society at large. The American public expects it of us and properly so. In the end, we earn the respect and trust of the American public because of the integrity that we demonstrate. It is this example that inspires troops to demonstrate similar integrity and self-sacrifice. When they know your word is your bond, then confidence and trust will permeate the outfit. On the other hand, nothing destroys an outfit's effectiveness quicker than a lack of integrity on the part of its leadership. Inevitably, a failure to comply with established requirements and procedures unnecessarily places at risk lives, equipment and operations.<sup>15</sup>

This suggests that the relationship among values, trust, and mission effectiveness is a strong one. Equally strong is the relationship between values and standards. *Values* are internal, individual qualities while discipline is the enforcement of institutional *standards* through punishment of military members who violate them. Though similar, it is important to understand that they are



not identical. Standards like the UCMJ can only define the behavior the military expects of persons whose values should motivate them to act professionally. Said another way, military law is the limit of minimum acceptable behavior while values inspire exceptional conduct.

The crisis currently facing the military is not that its standards are too high, rather, it's that some of its members do not possess the minimum values General Fogleman described. It seemed one of the reasons former Army Assistant Secretary Sara Lister recently described the Marines as "extremists" was because the Marine Corps' high expectations of its members far exceeded those of society in general.<sup>16</sup> If so, her criticism was misplaced. Rather than attributing this widening gulf in civil-military relations to increased military expectations and demands, she should have focused instead on society's relative moral decline. It is a decline that has forced the military in recent years to expand its indoctrination programs to include training in core values—values that each trainee should have brought to the military.<sup>17</sup>

It is often said that the most accurate image of oneself is seen through the eyes of another. If that is true, we should heed criticism offered by foreign observers. Among the most stinging and admittedly extreme foreign indictments of American society is Asian commentator Kishore Mahbubani's article, *Go East, Young Man*, in which he bristles at the hypocrisy of a morally-decaying United States whose foreign policy is focused on improving human rights abroad.<sup>18</sup> His message—get your own house in order before you criticize others—seems equally appropriate for our own Sara Listers who seem intent on placing all responsibility for the decline of civil-military relations at the military's doorstep. Just as the United States often demands that other nations adopt its conception of democracy and human rights, so, too, do the Sara Listers expect the military to conform to civilian notions of justice and fairness. Thus far, for reasons Justice Powell appeared to comprehend, the military has remained wedded to its traditional

notions of discipline. The question, again, is whether the Sara Listers are right. Are those notions still appropriate for the 21<sup>st</sup> Century?

### **Warfare in the 21<sup>st</sup> Century**

Depending on whose forecast one considers, 21<sup>st</sup> Century warfare will be highly technical and dependent on information technologies,<sup>19</sup> dominated by terrorist, asymmetric, and low-intensity methods,<sup>20</sup> or focused as it is today on operations other than war (OOTW) such as peacekeeping.<sup>21</sup> The first view is currently the most popular. The U.S. military is devoting much of its energy and resources to preparing for high-technology warfare.<sup>22</sup> Though it offered only a small taste of the kind of war we are preparing to fight, our resounding success in the Gulf War strongly reinforced the wisdom of our current technological investments. Most of our military leaders are now convinced that future warfare will be characterized by precision targeting, increased ability to deliver weapons from greater distances, enhanced economy of force, and higher operations tempo.<sup>23</sup> Increased lethality, speed, and power projection capability combined with decreased risk not only will enhance our armed forces' ability to defend vital United States interests anywhere in the world, they also will profoundly affect both the overall structure of our military and the demands we will place on individual warfighters. These latter individual demands will, in turn, define the characteristics we must look for or instill in our future soldiers, sailors, airmen, and Marines.

In the past several years, many commentators have observed that this technological revolution—technological developments that ultimately may lead to a Revolution in Military Affairs (RMA)—have wide-ranging implications for the organization of our armed forces and the extent to which individual soldiers will be empowered to fight wars. Whereas currently and in the past our military members fought in units led by officers or senior NCOs, in the future

such units will become obsolete. Several factors will drive this evolution, two illustrate specifically how technology will lead to vertical and horizontal efficiencies. First, as technology advances vertically, smaller forces will be able to inflict greater devastation. In his visionary article, *Building the Right Military for the 21<sup>st</sup> Century*, General John Sheehan, the former Commander-in-Chief of the U.S. Atlantic Command, describes this inverse relationship between precision and mass by comparing the effects of air power from World War II to the Gulf War. During the Gulf War, one F-117 armed with laser guided bombs was able to inflict the same level of damage that required 1,500 B-17s in World War II and 176 F-4s in the Vietnam War.<sup>24</sup> This phenomenon is not peculiar to the Air Force. It can also be traced in the increased lethality of the Army, Navy, and Marines. Second, technology will cut horizontally across functions enabling individual warfighters to perform more of them. Someday, communications, intelligence processing, and application of force will no longer be discrete activities requiring independent functional expertise. Each warfighter will be equipped to do all of them. The ultimate image—one not necessarily appealing to today's warfighters—envisioned a single soldier sitting at a computer terminal engaging and defeating an enemy with well-placed keystrokes. We will not see this picture anytime soon, however, by applying both of these dynamics to all aspects of warfare and extrapolating to the 21<sup>st</sup> Century, at least one can easily speculate that modern machines ultimately will significantly reduce the size of today's military units.

Along with the decrease in unit size and corresponding increase in lethality, General Sheehan argues that the 21<sup>st</sup> Century military must also flatten its command structure. Most of the multiple layers of supervision between the Secretary of Defense and the operational forces in the field stand, in Sheehan's view, as impediments preventing our military from adapting to the new international security environment. He laments that "while we have been brutally

successful in downsizing the operational forces, management agencies and headquarters staffs have only recently come under scrutiny”<sup>25</sup> His concern is motivated not only by the significant fiscal drag each layer of supervision inflicts on the military’s budget, but also by the filtering and delay each imposes on the flow of information. They are, in a word, redundant.

Finally, to complicate matters further, this lean, flat, efficient, quick, and capable 21<sup>st</sup> Century force designed to operate in a complex, fast-paced, and information-rich environment will be increasingly scrutinized under the media’s microscope. Just as klieg lights illuminated the U.S. Marines’ “surprise” amphibious landing in Somalia and news anchors played *ad nauseum* the cockpit video of a precision munition homing in on the elevator shaft of a building in Baghdad, the media will document and broadcast to an ever-critical world each warfighter’s keystrokes and their impact on the enemy. It is in this context that General Sheehan finally suggests that the future warfighter must not only be trained on how to operate new-fangled equipment, he or she must also understand “the economic, political and cultural dimensions of problems”<sup>26</sup>. In other words, the future warfighter must be able to act, think, and react independently and rationally. Armed with devastating weapons, under intense scrutiny, and without layers of supervision and, therefore, insulation, the 21<sup>st</sup> Century soldier will need to understand deeply all the implications of military action and be able to defend them.

### **Military Values and Discipline in the 21<sup>st</sup> Century**

What kind of soldier, sailor, airman, and Marine do we need to fight the kind of war our current and former leaders envision? General Sheehan’s answer is the one many of our military leaders generally share: *first and foremost, we need warfighters we can trust*.

Success in our profession depends on our professional competence, our integrity and our courage to do the right thing, no matter how unpopular. These traits are built on a special relationship, a relationship made of an intangible yet unbreakable bond of trust.<sup>27</sup>

This trust must be sufficient to inspire in commanders confidence that the individuals to whom they will entrust the future's awesome military weapons will do the right things at the right time. It is the same kind of trust and confidence Lt. Kelly Flinn's commanders once must have had in her ability as a B-52 pilot to employ nuclear weapons responsibly.

The question people like Trent Lott and Sara Lister ask is whether that confidence must be inspired only within a system of discipline that enforces rules prohibiting an officer from sleeping with an enlisted woman's husband. As self-evident as the answer may appear to military members—yes, of course, how can anyone trust an officer with a nuclear weapon when she can't be trusted to behave responsibly around married men or to obey orders to stay away from them?—I believe the answer is no. Confidence and trust are inspired not *only* by the UCMJ and its enforcement. The UCMJ is simply one small part of a much larger ethical and behavioral dynamic within which we must require our military members to operate. In other words, to earn a commander's confidence, it is almost always necessary but not always sufficient that a military member conform his or her behavior to the requirements of the UCMJ. I say *almost always necessary* because some minor UCMJ violations may not shake some commanders' trust in some subordinates. It is *not always sufficient* because an act does not have to be a crime to undermine confidence. However, it is imperative that the member *always* be motivated by the values Generals Fogleman and Sheehan described. Figure 1 illustrates this relationship.

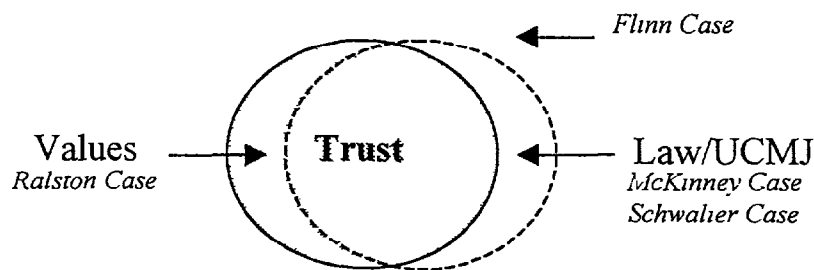


Figure 1 Relationship Between Law and Values

### *Case 1 Loss of Trust Outside the Spheres of both Law and Values*

Several of the recent cases I listed in the introduction illustrate these and a few other points. First, it is useful to continue parsing the Kelly Flinn case because some of its underlying factors are similar to characteristics of 21<sup>st</sup> Century warfare. When she committed her offenses, she was a member of a very small B-52 aircrew. They, like many small aircrews and individual pilots who fly single-seat aircraft, closely resemble the independent warfighters we expect will dominate 21<sup>st</sup> Century warfare. The weapons B-52s carry—large conventional and nuclear missiles and bombs—also approximate the lethality of weapons we will see in the future.

Arguably, with close, constant, and competent supervision, anyone can trust any unit, including a B-52 aircrew. However, without such supervision, only trust in the crew itself will suffice to justify delegating responsibility for such devastating weapons. To ensure such trust and confidence is deserved and maintained, the Air Force and other services for many years have administered Personnel Reliability Programs (PRP). These programs are designed to certify for nuclear and other special duties only those personnel whose conduct, past record, and present competence warrant the highest level of trust our nation can confer. UCMJ violations are usually automatic grounds for decertification, as are any other acts, criminal or not, that undermine a commander's confidence in a person's abilities or suitability.

By focusing only on whether Lt. Flinn's adultery and subsequent violation of an order to stay away from her married paramour should have been considered criminal, the American public lost sight of or never saw the larger question whether the Air Force could continue to trust her. Had the Air Force beat Lt. Flinn's lawyer to the media to explain its position in those terms, the public probably would have appreciated its concerns and the perceived civil-military rift over the case would have been much narrower. In fact, had the public viewed this case as a matter of

trust, I believe it would have shared the Air Force's conclusions and agreed with its approach. To illustrate that civilian and military notions of fairness are not so different, consider the case of a homeowner who hires a plumber to fix his sink and comes home one night to find him in bed with his wife. Most people would consider the homeowner justified in firing the plumber whether or not adultery was a crime under state law. To take the analogy a step further, few would object to the plumber's prosecution if he violated a court order to stay away from the homeowner's wife. The first example illustrates violation of trust, the second a violation of law. Kelly Flinn committed both.

*Case 2: Loss of Trust: Inside the Law but Outside the Sphere of Values*

The recent court-martial of former Sergeant Major of the Army Gene McKinney and the forced retirement of Brigadier General Terryl Schwalier provide a slightly different perspective on the dichotomy between values and discipline, trust and law. Sergeant McKinney was accused of several counts of sexual assault but convicted only of a single charge of obstruction of justice.<sup>28</sup> In the aftermath of this celebrated trial, some observers as well as McKinney himself regarded his acquittal on the sexual assault charges as proof of his innocence and reason for his vindication. The clear implication, of course, was that the Army was wrong to prosecute him in the first place.

Unfortunately, both the media's coverage of this case and McKinney's reaction were simply further examples of society's unreasonable focus on law to the exclusion of trust or values. The Army was certainly correct to prosecute him for the crimes it believed he committed. Equally important, though, was the Army Chief of Staff's decision months before the court-martial. Citing McKinney's "increasing difficulty" to fulfill his responsibilities, General Dennis Reimer suspended him as the Army's senior enlisted man.<sup>29</sup> Although the

evidence against McKinney may not have been sufficiently “beyond reasonable doubt” to convince a court-martial panel of his criminal liability, it was apparently enough to convince his superiors that they could no longer trust him. He no longer exemplified the values his seniors and subordinates reasonably expected of him.

General Schwalier’s forced retirement provides an even clearer example of the notion that acts inside the law may nevertheless place the actor outside the limits of his superiors’ trust and confidence. In 1996, General Schwalier was the commander of the 4404<sup>th</sup> Wing (Provisional) stationed in Saudi Arabia and responsible for enforcing the southern no-fly zone over Iraq. On 25 June 1996, a truck driven by terrorists and loaded with explosives approached “Khobar Towers,” the Dhahran apartment complex that housed the U.S. unit.<sup>30</sup> Despite the commendable reaction of an Air Force Security Police team posted on the roof of one of the apartment buildings, the truck exploded before the building’s occupants were fully evacuated. The toll—19 dead and over 350 wounded—shocked our nation and immediately cast suspicion on General Schwalier. The Secretary of Defense commissioned retired General Wayne Downing, former Commander-in-Chief of the U.S. Special Operations Command, to investigate. Among Downing’s findings was an indictment of General Schwalier’s lack of preparation. According to Downing’s report, Schwalier should have been more sensitive to the terrorist threat against U.S. military personnel in Dhahran and should have implemented measures to mitigate that threat.<sup>31</sup> In other words, Schwalier could have avoided this incident but didn’t.

The Air Force objected to holding Schwalier accountable for what essentially was an act of war. Though terrorism was foreseeable, in the Air Force’s view Schwalier had taken all the prudent steps within his authority to address the threat.<sup>32</sup> Despite the Air Force’s dissent, the Secretary of Defense nevertheless relied on the Downing Report to withdraw General



Schwalier's previous nomination for promotion to major general<sup>33</sup> The Secretary had clearly lost confidence in General Schwalier's ability to serve as an Air Force general officer Though he had not violated the law, he was judged to have violated a core military value protect your people at all costs In so doing, he lost the Secretary of Defense's trust

### *Case 3 Trust Preserved Breaking the Law Without Sacrificing Confidence*

Returning to Figure 1, one can see that Kelly Flinn occupied the area outside both the UCMJ and values—the area where criminal acts clearly undermine trust and confidence McKinney's acquittal of the most serious charges put his case mostly in the area within the UCMJ but still well outside the larger area defining values and trust Schwalier's behavior was clearly within the UCMJ but his failure to protect his troops destroyed the SECDEF's confidence in him Although, the Flinn, McKinney, and Schwalier cases together define most of the relationship between law and values, something is still missing One more area remains to be considered—the one most central to my thesis that trustworthiness should be the key qualification for military service The cases that fall in this last area are, in a sense, perhaps the most unsettling because they force us to face squarely the notion that *unlawful* conduct is not necessarily *untrustworthy* conduct The most notorious example recently involved the Vice Chairman of the Joint Chiefs of Staff, General Joseph Ralston

The Ralston case was one of the small minority of cases I described earlier as perhaps falling in the small area outside the law but inside the area where his superiors continued to have confidence in him Shortly after the Flinn case stirred up the passions of the American people, the Secretary of Defense announced his nomination of General Ralston to become General John Shalikashvili's successor as Chairman of the Joint Chiefs of Staff In American political life, highly visible nominations attract considerable attention Ralston's was no exception

Unfortunately, one of his closets contained a skeleton—an affair he had with a classmate while attending National War College before his promotion to the general officer ranks. In keeping with the maxim, “timing is everything,” the fact that Ralston’s case fell so closely on the heels of the Flinn case did not help the Secretary of Defense attempt to distinguish the two—both involved acts of adultery, however, Flinn’s disciplinary action was clearly based on her associated, more serious misconduct involving violating orders and lying about her activities. Although Ralston had committed adultery, the President and Secretary of Defense still considered him a trustworthy officer suitable for continued military service. He was thus allowed to remain and be reappointed as Vice Chairman though he removed himself from consideration for Chairman.

No doubt many will look at the Flinn and Ralston cases and conclude that their disparate treatment simply demonstrates how powerful people can get away with their misconduct while little people must suffer punishment. Though that may be one way of looking at them, the details of each really do matter. On the one hand, Flinn’s more egregious offenses were her refusals to obey lawful orders—offenses that strike at the heart of military discipline. She also had her affair with the husband of a junior enlisted person, an act that at least appeared to be an abuse of authority or position. Ralston, on the other hand, was separated from his wife while at war college and ultimately divorced her. Although he did commit adultery, apparently neither his act nor its impact on the military reflected adversely on his senior officer status. Had the object of his affections been another military member, the wife of a subordinate, or an employee over whom he exercised authority, that outcome would likely have been very different. Like many other similarly indiscreet officers over the years whose careers were cut short by affairs with people connected to their military communities, Ralston’s career, too, would probably have

ended with the revelation of his affair. What is hard to describe to those who have never served in the military—as well as to some who have—is why this distinction is important.

Some will also view any attempt to distinguish Ralston and Flinn as disingenuous. They will disagree that any violation of the law should be excused to allow the offender to remain in military service, especially under the future circumstances I've described. They will ask how any person can act outside the law yet still be considered trustworthy. There are two possible answers. The first assumes the Ralston case was within the law, the second assumes he was outside.

Although the public knows little of Secretary Cohen's deliberations in the Ralston case, the first answer might be that he simply did not believe General Ralston violated the UCMJ. Adultery is punishable under Article 134 of the UCMJ. That article is known as the "general article" because it allows commanders to punish almost any act that discredits the armed forces. To be guilty of adultery, not only must a military member have had a sexual relationship with someone other than his or her spouse, that relationship must have been "to the prejudice of good order and discipline in the armed forces" or "of a nature to bring discredit upon the armed forces." The law itself does not prohibit married members from having affairs, it only prevents them from having affairs *prejudicial to good order and discipline*. The UCMJ thus incorporates a military values/mission impact standard. If the adultery neither violates the institution's values nor adversely impacts its mission—in other words, does not bring discredit on the armed forces—it is not a crime. Perhaps the Secretary did not believe his conduct met either of these two criteria.<sup>34</sup> He had the discretion under the UCMJ to decide that General Ralston did not violate the law and that appears to be what he did.<sup>35</sup>

The second possible answer is that even if an act of misconduct violates the UCMJ, the perpetrator's commander can elect not to punish him or her. Although the UCMJ sets out specific elements of proof for each offense, each commander must determine whether justice would be served by prosecuting an offender and, if so, what forum would be most appropriate. One explanation for the outcome in the Ralston case, then, might be that the Secretary considered punishment inappropriate given the offender, the offense, or its impact on the military community. The Secretary may simply have felt that despite his unlawful affair, General Ralston continued to be a trustworthy officer.

Regardless how one may feel about this particular outcome or either of its possible rationales, they nonetheless illustrate the idea that trustworthiness, not necessarily adherence to law, is a *sine qua non* of military service.<sup>36</sup> They also explain why military members who violate the law but who are otherwise suitable for continued military service are allowed to continue serving.

## **Conclusion**

As a military judge advocate, I do not want to be misunderstood. I am not suggesting that the relationship between trustworthiness and adherence to the law is weak or, even worse, nonexistent. On the contrary, the two are very closely connected. In the vast majority of cases, criminal conviction doubles as a judgment that the person convicted can no longer be trusted and therefore should no longer be permitted to serve in the military. I also do not advocate we remove or circumvent the due process protections the UCMJ provides all military members by relying totally on something as subjective as trust. What I do propose is that 21<sup>st</sup> Century warfare will demand that we—military and civilians alike—focus less on law and more on

trustworthiness and the impact of specific acts on the military's mission when considering whether an individual who engages in misconduct is still suitable for service

The rift in civil-military relations will close only when our civilian superiors and counterparts understand that military discipline, values, and trust must be driven by the requirements of our increasingly complex missions. Thus, when future Trent Lotts ask us to “get real” and revise antiquated laws like adultery, we must concede only if we conclude those laws or their enforcement no longer foster military values. When future Sara Listers call us “extreme,” we must measure their judgments using trust or other mission-driven values as a standard. In the final analysis, *mission* must provide both a touchstone for common understanding between the military and civilians regarding discipline and a way of reconciling widely-differing disciplinary approaches like those in the Ralston and Flinn cases<sup>37</sup>. We owe our civilian brethren the courtesy of an explanation whenever we enforce standards they may not understand. Those explanations must begin and end by describing how the proposed action seeks to promote our ability to defend them.

Finally, refocusing our attention on trust rather than violation of law will also help military commanders decide when and how to punish misconduct. The UCMJ tells commanders when they *may* impose punishment, the misconduct's impact on their confidence and the military's mission should define when they *should* punish an offender and what kind of punishment should be meted. To a great extent, this latter standard is already a factor in a commander's deliberations. For example, adultery alone rarely results in court-martial whereas adultery with a subordinate undermines unit cohesion and the commander's confidence in the offender's judgment and commitment to the military institution and does usually warrant court-martial. Ultimately, shifting our focus to the impact of misconduct on our mission will give

some meaning to the idea that we do not have a “one mistake” military. As we have seen, we also do not necessarily have a “one crime” military. We do, however, have a military that cannot and should not countenance untrustworthiness. The sooner everyone inside and outside the military understands that, the quicker the civil-military rift over military justice will heal.

## ENDNOTES

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<sup>1</sup> *Deconstructing Distrust How Americans View Government*, The Pew Research Center for the People and the Press, available on internet, [http://allsa.jag.af.mil/groups/air\\_force/jax/jaxframe.htm](http://allsa.jag.af.mil/groups/air_force/jax/jaxframe.htm)

<sup>2</sup> For example, one new Air Force initiative—the establishment of a public affairs “SWAT” team—is designed to survey the horizon for significant issues and events, such as scandals, and formulate interdisciplinary response options for senior leaders Letter from the Secretary and Chief of Staff of the Air Force, *Authorization of Executive Issues Team*, dated 27 March 1998

<sup>3</sup> William H. McMichael, *The Mother of All Hooks*, (New Brunswick, NJ: Transaction Publishers, 1997)

<sup>4</sup> *Id.* at 329

<sup>5</sup> In fact, the Air Force Chief of Staff, General Ron Fogleman, retired over his disagreements with the Secretaries of the Air Force and Defense *Secretary of Defense Issues Khobar Towers Findings*, Air Force News Service, Aug. 1, 1997, available on internet, [http://www.af.mil/news/Aug1997/n19970801\\_970946.html](http://www.af.mil/news/Aug1997/n19970801_970946.html)

<sup>6</sup> John Hillen, *The Military Should Keep High Standards*, Air Force Times, 26 Jan 98, p. 32

<sup>7</sup> *Trent Gets It*, The American Spectator, Online Update, 20-26 May 1997, available on internet [http://www.spectator.org/exclusives/97-05-20\\_update.html](http://www.spectator.org/exclusives/97-05-20_update.html)

<sup>8</sup> *Those Extremist Marines*, Washington Bulletin, 26 Oct 97, available on internet, <http://www.nationalreview.com/nationalreview/daily/nr111297.html>

<sup>9</sup> Carl von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 189

<sup>10</sup> *Id.* at 189

<sup>11</sup> William T. Generous, Jr., *Swords and Scales*, (Port Washington, NY: Kennikat Press, 1973), 11

<sup>12</sup> *Id.* at 9

<sup>13</sup> *Id.* at 34

<sup>14</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1974)

<sup>15</sup> General Ronald R. Fogleman, *Integrity*, Air Force Magazine, February 1996, 91

<sup>16</sup> Hillen p. 32

<sup>17</sup> See, for example, Charles C. Krulak, *The Crucible: Building Warriors for the 21<sup>st</sup> Century*, Marine Corps Gazette, Jul 97

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<sup>18</sup> Kishore Mahbubani, *The United States 'Go East, Young Man'*, *The Washington Quarterly*, vol 17 2 (1994), pp 5-23

<sup>19</sup> A J Bacevich, *Just War II Morality and High-Technology*, *The National Interest*, Fall 1996, pp 37-47

<sup>20</sup> Anthony E Hartle, *A Military Ethic in an Age of Terror*, *Parameters*, Summer 1995, pp 120-127

<sup>21</sup> Ralph Peters, *A Revolution in Military Ethics?*, *Parameters*, Summer 1996, pp 102-108

<sup>22</sup> CJCS White Paper, *Joint Vision 2010*, (Joint Staff Washington, DC, 1997)

<sup>23</sup> *Id* at 11

<sup>24</sup> John J Sheehan, "Building the Right Military for the 21<sup>st</sup> Century," *Strategic Review*, Summer 1997, pp 5-13

<sup>25</sup> *Id* at 11

<sup>26</sup> *Id* at 12

<sup>27</sup> *Id* at 13

<sup>28</sup> *McKinney Not Guilty of Sexual Misconduct*, *Washington Post*, 14 March 1998, p A01

<sup>29</sup> *Top Army Noncom Suspended over Harassment Allegations*, CNN Interactive, 10 Feb 97, available on internet, <http://www.cnn.com/US/9702/10/army.scv/index.html>

<sup>30</sup> *Truck Explodes at Dhahran*, Air Force News Service, available on internet, [http://www.af.mil/news/Jun1996/n19660625\\_960620.html](http://www.af.mil/news/Jun1996/n19660625_960620.html)

<sup>31</sup> William S Cohen, *Report Personal Accountability for Force Protection at Khobar Towers*, Jul 31, 1997, available on internet, <http://www.defenselink.mil/pubs/Khobar/report.html>

<sup>32</sup> The Air Force issued two independent reviews of the Khobar Towers bombing and Downing Report Lt Gen James F Record, Twelfth Air Force Commander, conducted one such review and concluded that General Schwalier was not derelict in his duties *Independent Review of the Khobar Towers Bombing*, 31 Oct 96, available on internet, <http://www.af.mil/current/khobar/record.htm> Also, on 5 February 1997, the Chief of Staff of the Air Force tasked the Air Force Inspector General and Judge Advocate General to review the matter to determine whether disciplinary action was appropriate for any of the senior officers involved They also concluded General Schwalier was not derelict in his duties *Report of Investigation concerning the Khobar Towers Bombing*, available on internet, <http://www.af.mil/current/Khobar/part1.htm>



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<sup>33</sup> *Id*

<sup>34</sup> In a statement Cohen provided following Ralston's nomination to become Chairman of the Joint Chiefs of Staff, he said he "concluded that the actions [Ralston's affair] taken back in the mid 1980s did not disrupt the good order of the armed forces." Thus, the few public statements he made about the case suggested that Cohen did not consider Ralston's affair to violate the UCMJ *Double Standard?*, Online Newshour, June 5, 1997, available on internet, [http://www.pbs.org/newshour/bb/military/jan-june97/adultery\\_6-5a.html](http://www.pbs.org/newshour/bb/military/jan-june97/adultery_6-5a.html)

<sup>35</sup> Comparing Ralston to Schwalier, it also seems that Secretary Cohen did not consider Ralston's adultery sufficient to warrant firing him. Again, Cohen's continued confidence appeared to be the primary factor governing Ralston's treatment.

<sup>36</sup> Parenthetically, it also appears to be a major qualification for public office. In the wake of the President's continuing difficulties over sexual impropriety allegations, his approval ratings are among the highest in his tenure. Though he may have committed crimes—perhaps perjury—the clear majority of Americans still trusts him and approves of his performance.

<sup>37</sup> For an insightful commentary defending Secretary Cohen's decision to distinguish the Ralston and Flinn cases on the basis of mission impact, see Debra Dickerson, *Drawing the Right Line*, U S News & World Report, 16 June 1997, available on internet, <http://www.usnews.com/usnews/issue/970616/16comm.htm>